

analyzing Metro Broadcasting's opinions [497 U.S. 547 (1990)] and considering the impact of Adarand, it is impossible to conclude that the government's interest, no matter how articulated, is a compelling one." Lutheran Church at 355.

d. The New EEO Regulations are not Narrowly Tailored

The Commission-imposed classifications by race and gender, to be constitutional, must be "narrowly tailored measures" that further a compelling governmental interest. Adarand at 2113. The New EEO Regulations are not narrowly tailored. For example, if the Commission's true purpose under those regulations were simply to give potential job applicants the widest possible access to job vacancy information, there would be no need for any sort of tracking of an applicant's referral source, race, ethnicity or gender. All that would be required is for stations to identify the numerous ways they advertise their openings, how they develop awareness of broadcasting as a rewarding career among, for example, high school and college age students, etc. See, e.g., BEDA's "Model Broadcast Careers Program Road Map." If the Commission truly intends only to monitor national employment trends in the broadcast industry and report to Congress, all that it needs to do is require the filing of Annual Employment Reports under a tear-off sheet system so that once the filer has been logged in as having filed its report, the identity of the filer would be immediately disassociated from the data so that neither the Commission nor any member of the public could attribute the data to a particular station or stations. In any audit, including a random audit, the employment profile of the station would not be a subject for review. If an allegation of unlawful discrimination were made, the matter would be referred to

the EEOC for adjudication and any adverse results of which could be referred to the FCC for due consideration.

Under Adarand, the Court expects the Commission to sunset any race based regulations. Adarand at 2118. Not only has the Commission declined to do so, it has moved in the opposite direction making the New EEO Regulations even more permanent. See EEO R&O at para. 148. Given that the Lutheran Church court struck down (in effect “sunset”) the Commission’s former affirmative action regulations, at a minimum the Commission should be required to survey the effect, if any, of the absence of recruitment outreach regulations on its “diverse programming” goals before establishing new outreach regulations.

2. Deterring Discrimination Is Not A Legally Supportable Rationale for the New EEO Recruitment Outreach Requirements

The Commission urges, as a separate underpinning for its recruitment outreach regulations the need to deter racial and gender discrimination (EEO R&O at para. 3). To reflect this, the Commission has (i) expanded the concept of unlawful discrimination to include the failure to engage in adequate EEO recruitment outreach and (ii) invoked the basic qualifications standard under the Communications Act by equating every violation of the recruitment outreach regulations with “lack of character.” However, there is a patent fallacy to the Commission's scheme.

First, the Commission's new recruitment outreach regulations are certainly not intended to remedy past unlawful discrimination (EEO R&O at para. 229). The Commission has never previously claimed, and does not and cannot now claim, that the broadcast industry has been guilty of unlawful discrimination.

Second, if the Commission's concern is with the potential for future unlawful discrimination by individual stations, the Commission has not provided a reasoned explanation how the new recruitment outreach regulations will, in fact, deter such future unlawful discrimination. For example, if the outreach requirements are successful in causing a station to recruit more minorities and women, that success does not in and of itself deter intentional unlawful discrimination in employment by that station; only the prohibition against unlawful discrimination does. In short, the Commission's deterrence rationale is a non-sequitur.

If, on the other hand, the Commission's concern is that in the absence of any broad and inclusive outreach regulations, stations will fail to adequately recruit minorities and women, the Commission has not shown that such regulations are necessary to assure nondiscriminatory treatment of minorities and women. Significantly, the court in Lutheran Church rejected the notion that the Commission's former affirmative action outreach program was needed to "seek nondiscriminatory treatment of women and minorities." Lutheran Church at 352. The court stated: "That argument . . . presupposes that non-discriminatory treatment typically will result in proportional representation in a station's workforce. The Commission provides no support for this dubious proposition and has in fact disavowed it, saying that 'we do not believe that fair employment practices will necessarily result in the employment of any minority group in direct proportion to its numbers in the community.'" (citation omitted) Lutheran Church at 352. Accordingly, there is simply no factual or legal basis for the Commission to equate recruitment outreach with unlawful discrimination.

3. The EEO R&O is Otherwise Arbitrary and Capricious

Commission action which is arbitrary and capricious is unlawful and cannot stand. See 5 U.S.C. § 706(2)(A) (1994). In adopting its New EEO Regulations, that are far more burdensome than any it has previously promulgated, the Commission has acted in an arbitrary and capricious manner. There is no explanation in the EEO R&O as to why the rationale and proposals set forth in Streamlining should not be adopted. Indeed, the EEO R&O does not even discuss the concept of “streamlining.” There is no explanation as to why much more burdensome requirements are necessary. For example, under the former EEO rule, a licensee had to file one FCC Form 395-B annual employment report each year and an FCC Form 396 at license renewal time. Now, in addition to these forms, a licensee has to also file an election statement and an FCC Form 397 Statement of Compliance every two years, and place an EEO Public File Report in the public domain every year. There is no explanation as to why all of these additional reports are necessary.

The new outreach requirements are far more burdensome than before and require expensive programs by licensees. This is well-illustrated by the NAB’s side by side comparison of the former and new EEO regulations, which is attached hereto as Exhibit 1. The extensive nature of the New EEO Regulations necessitates that licensees assign at least one person at each station, no matter how small, simply to maintain the paperwork and monitor EEO efforts. Although the Commission had sought comments in 1996 on reducing or eliminating EEO reporting requirements for stations with ten or less full-time employees, and many commentors supported this proposal, the EEO R&O provides no relief to these small broadcasters. Although the Commission had not previously required the filing of EEO recruitment information

The Commission seeks to reduce the burdens of all broadcasters, not just broadcasters of small stations and other distinctly situated broadcasters, to the extent possible without decreasing the effectiveness of our EEO program.

Streamlining at 5168. The Commission reiterated this purpose in its Order and Policy Statement, 13 FCC Rcd 6322 (1998).

Between 1996 and the release of the EEO R&O, the District of Columbia Circuit decided Lutheran Church which in effect required the Commission to re-examine whether it had authority to promulgate any EEO regulations. The court certainly did not require the Commission to add more burdensome requirements. In fact, the court had expressed concern that the existing regulations already caused “economic harm by increasing the expense of maintaining a license.” Lutheran Church at 349-350. Yet the Commission’s response has been to pile on far more burdensome requirements than existed previously.

The New EEO Regulations are arbitrary and capricious in other respects. To mention only a few examples, given the expressed limited need for the Annual Employment Reports, it was arbitrary and capricious for the Commission not to adopt a tear-off sheet system. See pp. 15 and 24, supra. The Commission has failed to provide its regulatees with sufficient information for them to determine when their outreach efforts are legally adequate under either Option A or B. See p. 20, supra. The Commission has not even completed the rule making since it has failed to inform its regulatees what the base fine for a violation of the New EEO Regulations will be or what factors the Commission will consider relevant and material in determining whether there should be an adjustment in that base amount. See p. 20, supra. Moreover, the Commission is requiring stations to place the EEO Public File Reports on their websites, in addition to placing

them in their public files. See EEO R&O at para. 124. This requirement is an arbitrary and capricious burden on broadcasters because the purpose of the public file is to enable listeners and viewers within the station's local service area to obtain certain information. This goal is already fulfilled by requiring broadcasters to maintain public inspection files at their respective stations. The Commission rejected a similar website idea not too long ago. See Review of Commission's Rules Regarding the Main Studio and Local Public Inspection Files of Broadcast Television and Radio Stations, Report and Order, FCC 98-175, 13 FCC Rcd 15691 (released August 11, 1998).

C. NO IRREPARABLE INJURY WILL BE CAUSED TO OTHERS IF A STAY IS GRANTED

No one will be irreparably harmed by a stay of the New EEO Regulations during judicial review. The nondiscrimination prong of the Commission's current EEO regulations remains in full force and effect undisturbed by any stay. Accordingly, unlawful employment discrimination will continue to be prohibited, and the government retains the necessary and appropriate regulatory tools to enforce that prohibition. With respect to the recruitment outreach prong, the Commission did not conduct a survey of, find or even claim that the level of outreach effort that currently exists within the industry is inadequate to achieve "diverse programming." Furthermore, the Commission deliberated for fifteen months after the Court's decision denying rehearing en banc before adopting the New EEO Regulations. A respectful decision by the Commission to await the court's review under an expedited briefing schedule, particularly in view of the deficiencies in the EEO R&O, will create an important time interval for such review that is minor compared with the time period that has already elapsed.

D. THE PUBLIC INTEREST FAVORS A STAY

The public interest is disserved anytime the Federal Government takes action which violates the United States Constitution. That situation exists here. It will clearly serve the public interest for the government to take steps that will protect the Constitution and the rights of its citizens thereunder during judicial review of this matter. The ban against unlawful discrimination by broadcasters is not placed in jeopardy during the court's review. There are ample federal, state and local laws prohibiting unlawful discrimination that remain in force.

The public interest will be served by a grant of stay pending the appeal. The State Associations have already appealed to the very court which had constitutional concerns with the Commission's former EEO regulations. The New EEO Regulations are expressly intended to address those concerns (EEO R&O at paras. 5 and 229). A stay pending appeal will allow the court an appropriate opportunity to assess whether the Commission has adequately addressed those concerns without the Commission placing the broadcast industry and the people they recruit at risk of having their constitutional rights violated during the interim.

Lastly, a stay at least while the Commission considers the NAB's Reconsideration Petition (and any others that may be filed) will eliminate the likelihood of serious confusion within the broadcast industry and the nation, and thus would serve the public interest. For example, before the Commission for approval are several large broadcast merger transactions. If the parties are required to amend pending applications, depending on what action the Commission takes on reconsideration the parties may have to amend a second time. In any event, the Commission is required by law to carefully consider the issues raised by the NAB in its Reconsideration Petition. The speed with which the Commission acts on that petition, and the

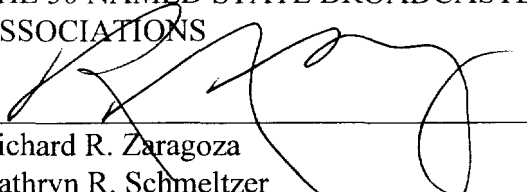
outcome of such action, are unknown and under the Commission's sole control. It would be fundamentally unfair and confusing to the broadcast industry, as well as to the intended beneficiaries of the New EEO Regulations, to begin this extensive and burdensome new program when the Commission may be persuaded, or compelled, to revise its new EEO program in numerous, material ways, or even to withdraw it.

III. CONCLUSION

A stay is appropriate where, as here, "a serious legal question is presented, when little if any harm will befall other interested persons or the public and when denial of the [stay] would inflict irreparable injury on the movant." WMATA at 844. For all the reasons shown above, the Commission should grant the requested stay.

Respectfully submitted,

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Dated: March 16, 2000

EXHIBIT 1



Side-by-Side Comparison of EEO Regulations

The following chart provides a comparison of the EEO rule requirements prior to the *Lutheran Church* decision (*i.e.* Old EEO Rules) and the New EEO Rules adopted by the FCC on January 20, 2000. The charts show a side-by-side comparison of the recruitment, recordkeeping and reporting requirements.

OLD EEO RULES	NEW EEO RULES
<p><u>Recruitment</u></p> <ul style="list-style-type: none"> ❑ Stations with five (5) or more full-time employees must recruit for all job vacancies (including lower-level employees). ❑ Recruitment is conducted specifically for minorities and females using targeted recruitment sources. ❑ Stations in markets with less than 5% minority population are exempt from having an EEO recruitment program for minorities. 	<p><u>Recruitment</u></p> <ul style="list-style-type: none"> ❑ Basic Obligation: Licensees subject to the EEO Program requirements (<i>i.e.</i> those stations with five (5) or more full-time employees) must widely disseminate information concerning each full-time job vacancy (including all lower-level employees). ❑ Stations must also choose between Option A or Option B, below <p>OPTION A</p> <ol style="list-style-type: none"> 1. Stations must provide notice of openings to qualifying organizations that request such notice; and 2. Participate in longer-term recruitment initiatives within a two-year period. Stations with five to 10 full-time employees must complete two initiatives. Stations with more than 10 full-time employees must participate in four initiatives. <p>OPTION B</p> <ol style="list-style-type: none"> 1. Stations must design their own broad and inclusive outreach program; and 2. Demonstrate that they are widely disseminating information concerning job vacancies by analyzing the recruitment sources, race, ethnicity and gender or the applicants attracted by their recruitment efforts. <ul style="list-style-type: none"> ❑ Stations in markets with less than 5% minority population are not exempt from having an EEO recruitment program for minorities.

Recordkeeping

- For each job vacancy, stations must have documentation on: job title and classification, recruitment sources used, # of minority/female applicants, copies of all ads and methods of notice of vacancy, documentation re: recruitment sources (cards, letters and memos on phone conversations).
- Documentation kept in station files – not in public file

Recordkeeping

OPTION A

Stations must collect, but not routinely submit to the Commission: (i) listings of all full-time jobs filled, identified by job title; (ii) the recruitment sources used to fill each vacancy, including any organizations which requested notification; (iii) the address, contact person and telephone number of each recruitment source used to fill each position; (iv) dated copies of all advertisements, letters, e-mails, faxes, etc. used to fill each vacancy; (v) documentation necessary to demonstrate performance of supplemental outreach initiatives, e.g. job fairs, mentoring programs; (vi) the total number of interviewees for each vacancy and the referral source for each interviewee; (vii) the date each job was filled and the recruitment source that referred the hiree.

OPTION B

Stations must collect, but not routinely submit to the Commission: (i) listings of all full-time jobs filled, identified by job title; (ii) the recruitment sources used to fill each vacancy; (iii) the address, contact person and telephone number of each recruitment source used to fill each position; (iv) dated copies of all advertisements, letters, e-mails, faxed, etc. used to fill each vacancy; (v) data reflecting the recruitment source, gender, and racial/ethnic origin of applicants for each full-time job filled.

Reporting

- **Form 395-B** (filed annually with FCC)
- **Form 396** (filed at renewal with FCC)
- **Form 396-A** (filed with any construction permit, assignment, or transfer application)
- **Mid-term Review** (TV stations only – limited to comparing Form 395-B report with workforce percentages)

Reporting

- **Initial Statement of Election** (filed once)
- **EEO Public File Report** (Annual report to public file, filed with FCC at mid-term review and at renewal. It also must be maintained on the station's webpage, if they have one).
- **Statement of Compliance (new Form 397)** (filed every two years)
- **Form 396** (filed at renewal with FCC)
- **Form 395-B** (filed annually at FCC, but not kept in public file)
- **Form 396-A** (filed with any construction permit, assignment, or transfer application)
- **Mid-term Review** (TV stations and radio stations with more than 10 full-time employees)

CERTIFICATE OF SERVICE

I, Nora L. Luersen, a secretary with the law firm of Fisher Wayland Cooper Leader and Zaragoza L.L.P., do hereby certify that I have this 16th day of March 2000, mailed by first-class United States mail, postage prepaid, copies of the foregoing JOINT PETITION BY 50 NAMED STATE BROADCASTERS ASSOCIATIONS FOR STAY OF NEW BROADCAST EEO RULES to the following:

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